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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1978

No. 79-269

LORI CHRISTINE LORENZ by KAREN JEAN LORENZ, her
Guardian *ad Litem*; and KAREN JEAN LORENZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.**

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Lori Christine Lorenz by Karen Jean Lorenz, her Guardian ad Litem, and Karen Jean Lorenz pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on April 23, 1979.

Opinions Below.

The opinion of the District Court is appended hereto as Exhibit "A". The opinion of the Court of Appeals is appended hereto as Exhibit "B". The order of the Court of Appeals denying Rehearing is appended hereto as Exhibit "C."

Jurisdiction.

The judgment of the Court of Appeals was entered on April 23, 1979.

A petition for rehearing was lodged May 17, 1979, and allowed to be filed on July 2, 1979, and an order denying the petition for rehearing was entered on July 2, 1979.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Question Presented.

Whether the Court of Appeal erred in failing to give effect to that portion of section 846 of the Civil Code of the State of California which excepts from its effect factual questions of willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.

Statutes Involved.

Section 846 of the Civil Code of the State of California provides in pertinent part as follows:

"An owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section. . . .

"This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. . . ."

Section 24400 of the Health and Safety Code of the State of California provides in pertinent part as follows:

"Every person owning land in fee simple or in possession thereof under lease or contract of sale who knowingly permits the existence on the premises of any abandoned mining shaft, pit, well, septic tank, cesspool, or other abandoned excavation dangerous to persons legally on the premises, or to minors under the age of twelve years, who fails to cover, fill or fence securely any such dangerous abandoned excavation and keep it so protected, is guilty of a misdemeanor."

Section 835 of the Government Code of the State of California provides in pertinent part as follows:

"Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that . . .

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

Section 835.2 of the Government Code of the State of California provides in pertinent part as follows:

"(a) A public entity had actual notice of a dangerous condition within the meaning of subdi-

vision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

(b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:

(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition."

Statement.

This action was instituted by the infant daughter and widow of Timothy J. Lorenz, who was killed while riding a motorcycle for recreational purposes on or near a rough graded roadway on property belonging to the United States of America, when his cycle fell

into an open mine shaft which was either on the road or on the side approaches to the road, depending upon where precisely the side of the road was located.

The United States moved to dismiss the complaint on the ground that the complaint failed to state a claim for which relief might be granted in view of California's Civil Code section 846, which relieved a property owner of liability for safety of the premises where a person enters to use the property for recreational purposes, with certain stated exceptions.

On page 2 of the plaintiff's complaint, which is page 2 of the Record on Appeal, in paragraph 6 it is alleged:

"The death of the plaintiffs' decedent was the further result of the willful failure of the defendant to guard or warn against the dangerous condition on its property, which was at all times known to the defendant as an open mine shaft marked upon its maps as the new Dixie Dale site."

This allegation was sufficient to bring the plaintiffs under the exception (a) in section 846 of the Civil Code, "for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. . . ."

The District Court in its Opinion, Exhibit "A" took no notice of the exception, and this lack of notice of the pertinent part of the statute which it purported to apply was repeated in the Opinion of the Court of Appeal, Exhibit "B", with a resulting dismissal of the action.

The District Court had original jurisdiction of the action under the Federal Tort Claims Act, 28 U.S.C. §1346.

ARGUMENT.

Under Rule 19 of this Court, where a federal court has decided an important state question in a way which is in conflict with applicable state law, a writ of certiorari will lie.

Subsequent or concurrently with the Opinion of the Court of Appeal there was reported the case of *Christopher Paul Mamola v. County of San Bernardino*, 94 Cal.App.3d 781 (July 1979) which reversed a summary judgment and established beyond any doubt, if ever there were doubt, that the question of whether a government entity had a duty to warn of a hazardous condition and whether it has breached that duty is a question of fact to be decided upon all the evidence.

In this case we have a federal court purporting to apply a state statute, section 846 of the Civil Code, failing to give effect to a specific exception set forth in the Code, and determining as a matter of law a matter which the state courts say must be determined as a question of fact.

Even if it could be argued that paragraph 6 of the complaint cited above requires the recitation of detailed facts to bring the plaintiffs under the exception set out in section 846(a), which would certainly not be in keeping with the liberal rules of federal pleading, it would have been incumbent upon the court to allow an amendment for such purpose. The dismissal of the action was totally wrong.

The plaintiffs should have been given an opportunity to present their evidence at the trial showing that the defendant had had its attention called to the open mine shaft on a number of occasions, and yet did nothing to close it or warn of its danger.

Section 24400 of the Health and Safety Code and Sections 835 and 835.2 of the Government Code are instructive, even though they may not be controlling. They show that the State of California requires the closing of open mine shafts, or other protective action to be taken, and as to its own public entities imposes liability for failure to protect against known hazards, and even those constructively known.

It is completely illogical and in direct contravention of the statute itself for a federal court to apply the state statute to relieve itself of liability under the Federal Tort Claims Act, while refusing to apply the very same statute to allow a factual question of whether there was a "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity" to be tried.

We cited to the Court of Appeal the case of *Ingram v. Bob Jaffe Co.*, 139 Cal.App.2d 193, 293 P.2d 132 (1956) the following language of the *Ingram* court:

"Willful misconduct . . . is *intentionally* doing something, or failing to do something, with the knowledge that injury to another will be a possible result of such act or omission. . . . *Intention is a question of fact.*" (Emphasis added.)

There should never have been any doubt, therefore, that the California courts considered the question of whether the landowner intentionally failed to protect against the danger, as one of fact, which required a trial on the evidence.

It is inconceivable that a court reading the complaint with the allegation of willful misconduct on the part of the federal government landowner, and reading the

statute which excepted willful misconduct from the absolute of liability in section 846 of the Civil Code, could have reached the conclusion that it was entitled to dismiss the action. It is perfectly apparent that under the laws of the State of California, which the courts were purporting to apply, there was a factual question to be determined. Under the rules of this court (Rule 19), a writ of certiorari should properly issue to correct this error, and the basic injustice entailed in precluding a plaintiff from presenting his case.

Conclusion.

The decision of the federal court is in conflict with applicable state law, and the Petition for Writ of Certiorari should be granted to rectify the matter.

Respectfully submitted,

JOHN S. PARISE,

Attorney for Petitioners.

EXHIBIT "A".

**Order Granting Defendant's Motion for
Dismissal of Action.**

United States District Court, Central District of California.

Lori Christine Lorenz, et al., Plaintiffs, v. United States of America, Defendant. No. CV 76-1445-R.

Filed: Dec. 9, 1976.

The motion of defendant for an order dismissing the action on the ground that the complaint fails to state a claim upon which relief can be granted, in view of California Civil Code § 846, came on for hearing on the 6th day of December, 1976, the Honorable Manuel L. Real, United States District Judge, judge presiding. Plaintiff appeared by John S. Parise, Esquire, and Dick Runels, Esquire; defendant appeared by William D. Keller, United States Attorney, Chief, Civil Division, and Donald J. Merriman, Assistant United States Attorney, by Donald J. Merriman. And the Court being fully advised in the premises, made the following Order.

IT IS ORDERED that defendant's motion for dismissal of the action be and the same hereby is granted.

IT IS FURTHER ORDERED that this action is hereby in all things dismissed.

DATED: This 8th day of Dec., 1976.

/s/ Manuel L. Real

UNITED STATES DISTRICT JUDGE

Presented By: William D. Keller, United States Attorney; Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief, Civil Division; By /s/ Donald J. Merriman, Donald J. Merriman, Assistant U. S. Attorney, Attorneys for Defendant.

EXHIBIT "B".

DO NOT PUBLISH

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Lori Christine Lorenz by Karen Jean Lorenz, her Guardian Ad Litem; and Karen Jean Lorenz, Plaintiffs-Appellants, vs. United States of America, Defendant-Appellee. No. 77-1621.

Filed: April 23, 1979.

Appeal from the United States District Court for the Central District of California.

Before: WALLACE and TANG, Circuit Judges, and BATTIN,* District Judge.

This appeal is from the judgment of the United States District Court for the Central District of California, dismissing plaintiff's Federal Tort Claims complaint for failure to state a claim upon which relief may be granted.

The trial court correctly concluded that even if negligent, the government cannot be held liable for injuries to persons using Bureau of Land Management land for recreational purposes, on the basis of California Civil Code § 846. Section 846 limits landowner liability for the recreational use of land by persons not expressly invited to do so to liability only for willful misconduct. We find that *Phillips v. United States*, F.2d, No. 75-3751 (9th Cir., Jan. 24, 1979), is dispositive of the issues raised in this appeal.

AFFIRMED.

*The Honorable James F. Battin, United States District Judge for the District of Montana, sitting by designation.

EXHIBIT "C".

DO NOT PUBLISH

Order.

United States Court of Appeals for the Ninth Circuit.

Lori Christine Lorenz by Karen Jean Lorenz, her Guardian Ad Litem; and Karen Jean Lorenz, Plaintiffs-Appellants, vs. United States of America, Defendant-Appellee. No. 77-1621.

Filed: July 2, 1979.

Appeal from the United States District Court for the Central District of California.

Before: WALLACE and TANG, Circuit Judges, and BATTIN,* District Judge.

The appellants in this case have petitioned for rehearing. Upon review, it is apparent that appellants' contentions are overborne by both *Phillips v. United States*, F.2d, No. 75-3751 (9th Cir., Jan. 24, 1979), as originally cited by this Court, and *Gard v. United States*, No. 77-1484 (9th Cir., Feb. 8, 1979, rehearing denied, April 19, 1979). Accordingly, appellants' petition for rehearing is denied.

*The Honorable James F. Battin, United States District Judge for the District of Montana, sitting by designation.